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No. 99-1704

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

INTER-MODAL RAIL EMPLOYEES ASSOCIATION, THOMAS FRANKS, CHARLES JONES, TOMMY MARTIN, HOYT JARRARD, ROBERT STEIN, AND ROBERT JAQUEZ,

Petitioners,

v.

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY CO., formerly known as THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; SANTA FE TERMINAL SERVICES, INC.; IN-TERMINAL SERVICES, INC.; and MI-JACK PRODUCTS, INC.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is review necessary to determine whether claims arising under ERISA §510 should be governed by a federal three-year limitations period borrowed from ERISA §§413(a) and 4301(f) in lieu of the most analogous state-law statute of limitations, notwithstanding the absence of any authority for this contention and Petitioners' failure to even raise it below?

2. Whether certiorari should be granted to determine whether the court of appeals properly applied a one-year California statute of limitations for actions based on wrongful discharge to Petitioners' §510 claim, in the absence of any direct and irreconcilable conflict between the Circuit Courts over what kinds of state-law limitations periods should apply to such claims?

3. Whether review should be granted to determine whether Respondents waived their statute of limitations defense to Petitioners' §510 claim, or whether the applicable limitations period was equitably tolled in this case?

CORPORATE DISCLOSURE STATEMENT

[Supreme Court Rule 29.6]

Respondents The Burlington Northern and Santa Fe Railway Co. and Santa Fe Terminal Services, Inc. are the subsidiaries of one parent or publicly-held corporation that owns more than 10% of their stock, Burlington Northern Santa Fe Corp.

Mi-Jack Products, Inc. and In-Terminal Services, Inc. have no parent or publicly-held companies which own more than 10% of the stock of either company.

LIST OF INTERESTED PARTIES

The parties to this proceeding are correctly identified in the Petition for Writ of Certiorari.

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STATEMENT OF THE CASE

This action arose out of a change in the employment of Petitioners on March 31, 1990. Until that date, Respondent Santa Fe Terminal Services, Inc. ("SFTSI") was signatory to an agreement with The Atchison, Topeka and Santa Fe Railway Co. (the predecessor to Respondent The Burlington Northern and Santa Fe Railway Co.) to provide loading and unloading of "intermodal" trailers and containers on and off of rail flatcars at the Railway's "Hobart yard" rail terminal in Los Angeles. Petitioners performed that function for SFTSI as members of two labor organizations, Teamsters Local Unions 63 and 208. (See Petition, pp. 9-10).[1]

In early 1990, SFTSI was competitively outbid by Respondent In-Terminal Services, Inc. ("ITS"), for a new service agreement at the terminal. As a consequence, most of Petitioners' members transferred their employment from SFTSI to ITS effective April 1, 1990. Petitioners allege that after they were hired by ITS, they suffered a reduction in contributions to, and benefits from, their Teamster-sponsored multi-employer pension and health and welfare plans as a result of this change in their employer and the negotiation of a new collective bargaining agreement between ITS and Locals 63 and 208. (See Appellant's Excerpts of Record on

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[1]Respondent Santa Fe Railway strongly disputes Petitioners' assertions that they "received their pay checks" from the Railway and enjoyed "Railroad employee status with FELA coverage and RRB [Railroad Retirement Board] benefits." (See Petition, p. 7). Respondent further disputes Petitioners' assertion that they were discharged from their employment with the Railway, because none of them were ever Railway employees. (See Petition, pp. 3 and 8-9).

Appeal, hereinafter "E.R.," at p. 14, ¶ 31).

This action was commenced on July 17, 1992, more than two years after the change in Petitioners' employment. Petitioner's original Complaint alleged three claims for relief, for (1) interference with their rights in violation of § 510 of ERISA, 29 U.S.C. § 1140, (2) personal injuries under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51, et seq., and (3) wrongful discharge in violation of public policy. (See Appellees' Supplemental Excerpts of Record on Appeal, hereinafter "S.E.R.," pp. 1-9). The action was brought by the "Inter-Modal Rail Employees Association" (IMREA) as the assignee of the claims brought by Petitioners or, in the alternative, as a class action on their behalf.

In April 1993, the district court granted Respondents' motion to dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), based primarily on the ground that Petitioners had not stated an actionable claim for violation of § 510 of ERISA and could not maintain a class action under FELA.[2] The Ninth Circuit Court of Appeals subsequently upheld the dismissal of Petitioners' § 510 claim to the extent it was based on the alleged interference with their health and welfare and railroad retirement benefits, but held that the district court erred in dismissing their claim for interference with their rights to pension benefits under the statute. Inter-

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[2]The court also dismissed Petitioners' third cause of action for wrongful discharge in violation of public policy because it was not filed within one year as required by Cal. Code of Civ. Proc. § 340(3) -- the same statute of limitations that the court ultimately applied to their ERISA claim. (See S.E.R. 21, 35)

Modal Rail Employees Association v. The Atchison, Topeka & Santa Fe Railway Co., 80 F.3d 348, 351-2 (9th Cir. 1996). On certiorari, this Court held that a claim could be maintained under § 510 for interference with Petitioners' non-vested "health and welfare" benefits, and remanded the case for further proceedings. Inter-Modal Rail Employees Association v. The Atchison, Topeka & Santa Fe Railway Co., 520 U.S. 510, 117 S.Ct. 1513, 137 L.Ed.2d 763 (1997).

After remand, Petitioners filed a First Amended Complaint alleging a violation of § 510 of ERISA and personal injuries under FELA.[3] On November 23, 1998, the district court granted Respondents' motion for summary judgment on the § 510 claim on the ground that it was barred by the one-year limitations period contained in California Code of Civil Procedure (C.C.P.) § 340(3). The court specifically concluded that the "primary interest" which was invaded by the Respondents' alleged wrongful conduct was Petitioners' personal interests in not being wrongfully terminated from their employment by SFTSI, and that the one-year statute for tortious wrongful discharge claims was applicable under the Ninth Circuit's decision in Burrey v. Pacific Gas & Electric Co., 159 F.3d 388 (9th Cir. 1998) decided earlier that year. (App. III, 22a). Petitioners thereafter filed a motion for reconsideration of the district court's decision, which was denied. (E.R. 418-26; App. I, 4a-10a).

In its unpublished memorandum decision of January 21, 2000, the Ninth Circuit affirmed summary judgment for

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[3]The district court subsequently dismissed the claims of the "Inter-Modal Rail Employees Association" for lack of standing, thus rendering the Association's inclusion as one of the parties to this petition improper. (See E.R., 30-31).

Respondents on Petitioners' § 510 ERISA claim on the ground that it was not timely filed within the one-year limitations period applicable to § 510 claims in California. The Court of Appeals held that the Burrey case was properly given full retroactive effect to this action, and that the one-year statute of limitations contained in C.C.P. § 340(3) was properly applied to Petitioners' claim because the "essential nature of the action" was to remedy a violation of "personal rights" implicated by § 510. (See Appendix I, 6a-10a).[4] The Ninth Circuit also categorically rejected Petitioners' contentions that Respondents waived their statute of limitations defense, and that the applicable limitations period was equitably tolled in these circumstances. (Id. at 6a, 8a). No petition for rehearing or suggestion for rehearing en banc was filed.

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[4]In holding that Burrey was properly applied to the case at hand, the Court distinguished Chevron Oil Co. v. Huson, 404 U.S. 97, 106-7, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971) on the ground that Burrey did not overrule any "clearly established precedent" on which Petitioners were entitled to rely. (See Appendix I, 7a, n. 5, citing St. Francis College v. Al-Khazraji, 481 U.S. 604, 608, 107 S.Ct. 2022, 95 L.Ed.2d 582 (1987) and Goodman v. Lukens Steel Co., 482 U.S. 656, 662-4, 107 S.Ct. 2617, 96 L.Ed.2d 572 (1987).

REASONS FOR DENYING THE WRIT

I.

PETITIONERS' ARGUMENT IN FAVOR OF BORROWING A FEDERAL LIMITATIONS PERIOD HAS BEEN WAIVED BECAUSE IT WAS NOT RAISED BELOW AND IS MERITLESS IN ANY EVENT

A. Petitioners Have Waived Their Contention That Any Limitations Periods In ERISA Apply to § 510 Actions

The principal argument presented in the certiorari petition is that a uniform federal limitations period should be borrowed from elsewhere in ERISA. Petitioners specifically contend that this Court should grant review and adopt a uniform three-year limitations period to § 510 claims based on §§ 413(a) or 4301(f)(2) of ERISA, 29 U.S.C. §§ 1113(a)(2) and 1451(f)(2). (Petition, p. 23). However, Petitioners did not propose the application of either of these federal statutes to their § 510 claim in the proceedings below, nor did they argue that a federal law limitations period applied to that claim pursuant to the "narrow exception" to borrowing state limitations periods in these circumstances. See Appellees' Joint Answering Brief, p. 13, n. 2 [citing Reed v. United Transportation Union, 488 U.S.

319, 324, 109 S.Ct. 621, 102 L.Ed.2d 665 (1989) and DelCostello v. International Brotherhood of Teamsters, 460 U.S. 151, 172, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983)]. Rather, Petitioners consistently argued, both in the district court and the appellate court, only that a three or four-year limitations period should be borrowed from state law for application to their § 510 claim in these circumstances, thereby fully conceding the propriety of borrowing a state limitations period.[5] (See Appellants Opening Brief, p. 19 (arguing that the duty of the federal courts under Reed was to "formulate an analogy to the various California causes of action that would avoid the importation into ERISA" of the one-year limitations period applied in this case); Appellants Opening Brief, p. 34 (correctly noting that since ERISA § 510 does not contain its own statute of limitations, litigants such as Petitioners "must look to the most analogous statute of limitations under *state* law"); S.E.R. 148 (in which Petitioners' counsel expressly acknowledged that § 510 is a "public policy type tort claim which borrows the statute of limitations from whatever analogous *state laws* exist in the various jurisdictions").

Because Petitioners failed to raise their federal limitations argument below, they have accordingly waived it and the Court should decline to consider it. See Grupo Mexicano v. Alliance Bond, 527 U.S. ___, 119 S.Ct. ___, 144 L.Ed. 2d 319, 330, n. 3 (1999); Matsushita Electric

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[5]Petitioners no longer contend that the four-year limitations period contained in C.C.P. § 337(1) applied to their claim, nor could they reasonably do so given the utter lack of merit of that contention and the Ninth Circuit's outright rejection of it. (See Appellees' Joint Answering Brief, pp. 23-29; App. I, 9a).

Indus. v. Epstein, 516 U.S. 367, 379, n. 5, 116 S.Ct. 873, 134 L.Ed.2d 6 (1996); Holly Farms Corp. v. NLRB, 517 U.S. 392, 400, n. 7, 116 S.Ct. 1396, 134 L.Ed.2d 593 (1996).

B. The Lower Federal Courts Have Uniformly Rejected A Federal Limitations Period For § 510 Claims

Apart from Petitioners' failure to raise their federal limitations period argument at any prior point in these proceedings, this argument has never been accepted by any federal court, anywhere. Every federal court which has considered the proposition that a federal statute of limitations, including §§ 413(a) or 4301 of ERISA, should be applied to § 510 claims has unhesitatingly rejected it. See Held v. Manufacturers Hanover Leasing Corp., 912 F.2d 1197, 1200, 1209-10 (10th Cir. 1990); McClure v. Zoecon, Inc., 936 F.2d 777, 778, n.2 (5th Cir. 1991); Sandberg v. KPMG Peat Marwick, LLP, 111 F.3d 331, 336 (2d Cir. 1997)(holding that the "available state-law limitations periods satisfy the federal government's interest in ensuring that an employer fulfill its obligations under ERISA"); Teumer v. General Motors Corp., 34 F.3d 542, 547, n.1 (7th Cir. 1994)(finding no particularly appropriate federal analogue that would "prompt us to part from the usual practice [of borrowing the most applicable state law statute of limitations] in this case"). Some courts have in fact expressly rejected application of the limitations period contained in § 413 to § 510 claims. See Teumer, supra, 34 F.3d at 546; Wright v. Southwestern Bell Tel. Co., 925 F.2d 1288, 1291 (10th Cir. 1991); DeWitt v. Penn-Del Directory Corp., 872 F.Supp. 126, 136 (D. Del. 1994).

There is good reason for this uniform rejection of efforts to borrow limitations periods from other parts of ERISA, because (as Petitioners concede in their Petition) § 413(a) expressly applies only to actions under Title I, Subtitle B, Part 4 of ERISA for breaches of fiduciary duty, and § 4301 expressly governs only actions against multiemployer plans under Subtitle E of Title IV of the statute (See Petition, p. 4).[6] Since no circuit court has ever adopted or even suggested adopting either of the suggested federal analogues to § 510 claims, there is clearly no conflict among the circuits regarding the propriety of doing so. Nor is there any other basis in Supreme Court Rule 10 that would support the grant of certiorari on this issue.

Indeed, this argument runs counter to well established principles of federal law. When Congress fails to provide a statute of limitations for claims arising under federal statutes, a court must generally apply the limitations period of the state-law cause of action most analogous to the federal claim. Wilson v. Garcia, 471 U.S. 261, 267-8, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985). This requires the court to "characterize the essence" of the plaintiff's federal claim (Id. at 267-70), and apply the statute which "substantively most resembles the federal action." Agency Holding Corp. v. Malley-Duff & Associates, Inc., 483 U.S. 143, 152, 107 S.Ct. 2759, 97 L.Ed.2d 121 (1987). Petitioners thus acknowledge that when a federal statutory claim does not

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[6]Moreover, this Court did not acknowledge that § 510 claims are "quite similar" to breach of fiduciary claims in its decision of Varity Corp. v Howe, 516 U.S. 489, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996), as Petitioners assert; in fact, this Court did not even address § 510 claims in its opinion in that case. (See Petition, p. 22, n. 15).

provide its own limitations period, a court generally applies the "state statute which is 'most closely analogous" to the federal Act in need." See Petition, p. 10, citing North Star Steel Co. v. Thomas, 515 U.S. 29, 34, 115 S.Ct. 1927, 132 L.Ed.2d 27 (1995). Only when the state limitations rule is "at odds for the purpose of operation of federal substantive law," has the Court recognized a "closely circumscribed exception" from the general rule that statutes of limitation are to be borrowed from state law. Reed, supra, 488 U.S. at 324. Accordingly, resort to state law remains the norm for "borrowing purposes" except

> [w]hen a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial law making.

DelCostello, supra, 460 U.S. at 171-2; Reed, supra, 488 U.S. at 323-4.

Petitioners have failed to show that the requirements for application of this narrowly circumscribed exception to the general rule of borrowing state limitation periods apply in this case. They have not even begun to explain why any of the suggested provisions of ERISA would constitute a "closer analogy" to § 510 actions than state statutes of limitation applicable to wrongful discharge causes of action which, as shown infra, have been invoked in virtually all states in which such claims exist. Petitioners accordingly attempt to achieve here judicially what Congress did not do

legislatively, and urge the Court to adopt a limitations period in derogation of the usual procedure for finding the most appropriate limitations period in these circumstances. Stated differently, they ask this Court to address an argument that calls for a radical departure from existing law, when it was not raised below and has never been accepted or even considered by the by Ninth Circuit in this case or by any other federal court.[7] For each of these reasons, the Court should deny the petition.

[7]In contrast, in both North Star and Reed, supra, the Court resolved splits in the circuit courts over whether statutes of limitations applicable to various federal statutory claims should be borrowed from state or federal law. See North Star, supra, 515 U.S. at 33 (resolving conflict between circuits in borrowing state-law or National Labor Relations Act (NLRA) limitations periods to actions brought under the Workers' Adjustment and Retraining Notification ("WARN") Act, 29 U.S.C. § 2101, et. seq.; Reed, supra, 488 U.S. at 323, n.3 (resolving conflict between circuits as to whether the NLRA or state-law limitations periods applied to claims brought by union members under the free speech and assembly provisions of the Labor Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 411(a)(2). Significantly, the Supreme Court decided in both cases that state-law limitations periods applied to claims brought under these federal statutes.

II.

REVIEW IS NOT NECESSARY TO DETERMINE WHETHER THE COURT PROPERLY APPLIED CALIFORNIA'S ONE-YEAR STATUTE OF LIMITATIONS FOR TORTIOUS WRONGFUL DISCHARGE CLAIMS TO PETITIONERS' SECTION 510 ACTION

A. There Is No Direct And Irreconcilable Conflict Among The Circuit Courts As To What State Statute Of Limitations To Apply ERISA Section 510 Claims.

Petitioners next contend that this Court must grant certiorari because the courts of appeal "differ widely" in their selections of statutes of limitation. (Petition, p. 15). However, this is not a "conflict" within the meaning of Rule 10. Rather, a conflict must ordinarily be "square and irreconcilable" and implicate a matter of federal importance in order for review to be granted. Supreme Court Rule 10(a); Stein, et al., *Supreme Court Practice*, 7th Ed. 1993, § 414, p. 168, citing Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 373, 101 S.Ct. 669, 66 L.Ed.2d 571 (1981).[8]

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[8]Thus, for example, the Court previously granted review in this action to resolve a direct conflict between the circuit courts over whether § 510 actions may be based on the interference with "non-vested" as opposed to "vested" benefits. See Inter-Modal, supra, 137 L.Ed.2d at 768.

Contrary to Petitioners' assertions, the application of different statutes of limitations in different states poses no conflict requiring certiorari to resolve, but rather constitutes a natural by-product of the general rule that the courts borrow the limitations period applicable to the most analogous state-law cause of action for § 510 claims.

Petitioners first ignore the fact that almost all courts have construed § 510 claims as analogous to wrongful discharge or employment discrimination claims. See McClure v. Zoecon, Inc., supra, 936 F.2d at 778, and cases cited therein. Thus, in 1994, the Seventh Circuit borrowed the Illinois limitations period governing retaliatory discharge claims under § 510 actions [See Teumer v. General Motors Corp., supra, 34 F.3d at 550], and other federal courts have almost uniformly followed suit in characterizing claims under § 510. See Jaskilka v. Carpenter Technology Corp., 757 F.Supp. 175, 177 (D. Conn. 1991) (holding that a complaint alleging discharge for the purpose of depriving an employee of retirement benefits under ERISA bears a "close resemblance to a cause of action for wrongful discharge in violation of a clear mandate of public policy under Connecticut law"); Corkery v. SuperX Drugs Corp., 602 F.Supp. 42, 45 (M.D. Fla. 1985) (Section 510 action held analogous to an employment termination case); Bollenbacher v. Helena Chemical Co., 934 F.Supp. 1015, 1030 (N.D. Ind. 1996) (applying Indiana's statute of limitations for retaliatory discharge claims to § 510 actions); Giuffre v. Delta Airlines, Inc., 746 F.Supp. 238, 241 (D. Mass. 1990) (retaliatory discharge claim held analogous to § 510 claim under Massachusetts law).[9]

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[9]See also Barnett v. International Business Machines Corp., 885

After reviewing the numerous cases which applied limitation periods for wrongful discharge claims to § 510 actions, the Fifth Circuit in McClure acknowledged the Eighth Circuit's decision in Heideman v. PFL, Inc., 904 F.2d 1262, 1267 (8th Cir. 1990), which held that a contract analogue was appropriate -- but noted that the Heideman court adopted that limitations period "without analysis" and "without allocating more than one sentence to the issue of which limitation statute properly applied." Ibid., 936 F.2d at 779. The circuit court in Heideman in fact merely upheld the application of a six-year statute of limitations adopted from Tennessee law by the district court, which had merely (and, once again, without any analysis) held that such a limitations period applied to § 510 claim because it was also applicable to claims brought for the denial of benefits under 29 U.S.C. § 1132. See Heideman v. PFL, Inc., 710 F.Supp. 711, 720, n. 19 (W.D. Mo. 1989).

By affirming the application of California's one-year limitations period for wrongful discharge claims in violation of public policy contained in C.C.P. § 340(3) in this instance, the Ninth Circuit therefore acted in accord with most of the other circuit and district courts which have addressed the issue. Moreover, to the extent that certain circuit courts have applied limitations periods applicable to other kinds of claims to § 510 actions, such rulings can be reconciled by the obvious fact that causes of actions vary from state to state, as

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F.Supp. 581, 592 (S.D. N.Y. 1995)(citing McClure); Sutter v. First Union National Bank of Virginia, Inc., 932 F.Supp. 753, 757 (E.D. Va. 1996) (holding that Virginia's common law cause of action for wrongful discharge was most analogous to an action under § 510); Baradell v. Board of Social Services, 970 F.Supp. 489, 494 (W.D. Va. 1997).

do statutes of limitations. See Musick v. Goodyear Tire & Rubber Co., Inc., 81 F.3d 136, 139 (11th Cir. 1996). The courts have in fact recognized that there is no way to eliminate disparities among various limitations periods to applicable § 510 actions arising in different states, given the fact that this is the natural and inherent result of Congress' choice not to specify a limitations period for such claims. See Anhert v. Delco Electronics Corp., 982 F.Supp. 1320, 1327 (S.D. Ind. 1997).

Petitioners purport to identify only one situation in which courts have reached different results under the law of the same state. Petitioners claim that the Second Circuit's decision in Sandberg v. KPMG Peat Marwick, LLP, supra, 111 F.3d at 335 conflicts in this sense with the earlier decision of the Tenth Circuit in Held v. Manufacturers Hanover Leasing Corp., supra, 912 F.2d at 1207 (10th Cir. 1990) (Petition at 16). However, careful examination of the Second Circuit's opinion indicates otherwise. The Second Circuit expressly noted that New York does not have a cause of action for "wrongful discharge," and therefore could not use this analogue for § 510 claims. It therefore borrowed the limitations period from a New York workers' compensation statute (N.Y. Work. Comp. Law § 120). Significantly, the Second Circuit expressly considered the Tenth Circuit's decision in Held – which applied New York's six-year limitations period for breach of contract actions – but pointed out that the workers' compensation statute had not been adopted until 1994, and therefore was not available to the Held court. See Sandberg, supra, 111 F.3d at 336. This kind of evolving response to a changing statutory scheme simply does not constitute a "conflict" within the meaning of Rule 10.

The only other Circuit Court of Appeals decisions cited by Petitioners which did not apply a tortious wrongful discharge analogue to § 510 actions were issued by the Eleventh Circuit in Clark v. Coates & Clark, Inc., 865 F.2d 1237, 1241 (11th Cir. 1989) (applying two-year limitation period for enforcement of statutory rights under Georgia law) and Byrd v. MacPapers, Inc., 961 F.2d 157, 159 (11th Cir. 1992) (applying limitations period for retaliatory discharge for filing workers' compensation claim under Florida law) (See Petition, p. 16, n.6). However, neither Georgia nor Florida recognize common law causes of action for retaliatory wrongful discharge. See Borden v. Johnson, 196 Ga. App. 288, 289, 395 S.E.2d 628 (Ga. App. 1990) (rejecting any "public policy" exception to Georgia's at-will employment rule absent codification in statute); Hartley v. Ocean Reef Club, Inc., 476 So.2d 1327, 1329 (Fla. App. 1985) and Smith v. Piezo Technology Professional Administrators, 427 So.2d 182, 184 (Fla. 1983) (confirming that no common law tort of retaliatory discharge exists in Florida, and that the legislature had prescribed a wrongful discharge cause of action in that state only for employees who are fired for bringing workers' compensation claims). The Clark and Byrd courts' borrowing of Georgia's and Florida's statutes of limitations for enforcement of a statutory claim and for retaliation for filing a workers' compensation action to the § 510 claims in those cases can therefore easily be reconciled and explained by the limited kinds of causes of action available in those states, and the absence of any tortious wrongful discharge analogue to apply to § 510 claims.[10]

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[10]For this reason, this case is a poor vehicle for instructing federal courts

This Court in fact largely disposed of Petitioners' contention in North Star Steel Co. v. Thomas, supra, 515 U.S. at 36, in which it was urged that a uniform federal statute of limitations should be applied to actions brought under the WARN Act. The Court there readily acknowledged that

> the practice of adopting state statutes of limitations for federal causes of action can result in different limitations periods in different States for the same federal action, and . . . that some plaintiffs will canvass the variations and shop around for a forum. But these are just the costs of the rule itself, and nothing about [the federal statute in issue] makes them exorbitant.

Petitioners have accordingly failed to demonstrate that a sufficiently direct, significant, and irreconcilable conflict presently exists among the circuit courts with respect to what state statute of limitations to borrow for § 510 claims. More significantly, they have failed to demonstrate how the Ninth Circuit's decisions in this case and in Burrey are in conflict with any other circuit court decision on the important question of *how* the statute of limitations should be

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on how to handle situations such as those confronted by the Second and Eleventh Circuits, in which the pertinent state law did not recognize a cause of action for wrongful discharge. In direct contrast to the cases from those circuits, this case *does* involve a state scheme in which there is an analogous wrongful discharge cause of action and associated limitations period. Thus, determining whether or not such a limitations period was properly applied in this instance would not assist the appellate courts with jurisdiction over states which do not have such causes of action, on which limitations periods should apply to § 510 claims.

determined for claims brought under § 510. Nor is there any conflict with this Court's past decisions; rather, the Ninth Circuit did exactly what it was supposed to do under the well-settled rules articulated in Reed and North Star for borrowing the most analogous state law limitations period to the "federal Act in need." The petition must accordingly be denied on this basis as well.

B. The Ninth Circuit Properly Applied California's One-Year Statute Of Limitations For Tortious Wrongful Discharge Claims To Petitioners' Section 510 Claim

As previously noted, the Ninth Circuit applied a one-year statute of limitations under C.C.P. § 340(3) to Petitioners' § 510 action, as opposed to the three-year limitations period for causes of action based on liability created by statute contained in C.C.P. § 338(a).[11] Initially, the issue of which statute of limitations should be selected for application to § 510 claims in an individual state does not

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[11]Petitioners cite Barton v. New United Motors Manufacturing Co., 43 Cal.App.4th 1200, 1209, n.6 (1996) in support of their contention that § 338(a) should be applied to their § 510 claim because it is a "statutory claim that did not exist at common law." But this misses the point: applicable statutes of limitations in these circumstances are almost always borrowed from the most analogous *state-law cause of action*, because otherwise federal claims such as § 510 actions would always be governed by the limitations period for violations of various state statutes. See Clark v. Coats & Clark, Inc., supra, 865 F.2d at 1241 (court finds the "most analogous state law *claim* when adopting a limitations period to a federal law").

raise an issue of national importance, and is therefore an insufficient ground for granting review by this Court under Rule 10. Nevertheless, the Ninth Circuit properly applied the one-year statute of limitations period in this instance.

Petitioners principally contend that the Ninth Circuit erred in borrowing a state statute of limitations first clarified by an appellate court decision in 1996 to their § 510 claim filed four years earlier.[12] This argument, based on the particular history of an individual case, is even more narrow than the question of what limitations period should typically be borrowed from California law for application to § 510 actions, and therefore provides a patently insufficient ground for review. Moreover, this contention ignores the well-settled proposition that "a rule of law, once announced and applied to the parties in a controversy, must be given full retroactive effect by all courts adjudicating federal law." [See App. I at 6a-7a, citing Harper v. Virginia Department of Taxation, 509 U.S. 86, 96, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993)]. The Ninth Circuit thus properly relied upon its 1998 decision in Burrey, which borrowed the one-year limitations period adopted by the California Court of Appeal in 1996 for tortious wrongful discharge claims in California.

In doing so, the Ninth Circuit in no way "did violence" to ERISA's "broad remedial purposes." (See Petition, p. 12). Congress and the courts have traditionally

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[12]Petitioners refer to the California Court of Appeal's decision in Barton, supra, 43 Cal.App.4th 1200. They continue to ignore the fact, however, that the Ninth Circuit found that the one-year statute of limitations under C.C.P. § 340(3) applied to claims for wrongful discharge in violation of public policy in a decision issued eight years earlier. See Funk v. Sperry Corp., 842 F.2d 1129, 1133 (9th Cir. 1988).

applied shorter statute of limitations periods to labor-based claims which arise out of major consequences such as the loss of employment, since such consequences are "known to the employee from the moment the action occurs" and thus provide an immediate basis for an "adequate pre-filing inquiry" that Petitioners contend they should have had time to make. See Anhert, supra, 982 F.Supp. at 1326; see also Title VII of the U.S. Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(e)(1) (providing that employment discrimination claims are generally required to be filed within 180 days).

Indeed, Petitioners readily acknowledge the fact that the lower federal courts have routinely and consistently applied limitations periods of two years or less to § 510 actions, which would have barred their claim here. See Petition, n. 6 (citing cases applying two-year limitation periods under Alabama and Georgia law to § 510 actions); n. 7 (citing authority applying Texas' two-year wrongful discharge employment discrimination limitation to § 510 claim and Louisiana's one-year limitation period for wrongful discharge actions); Anhert v. Delco Electronics Corp., supra, 92 F.Supp. at 1326, and cases cited therein. Their contention that borrowing a limitations period of less than three years somehow contravenes ERISA's "remedial purposes" is therefore squarely at odds with the substantial body of case law applying shorter limitations periods to § 510 claims.

Moreover, to the extent that it is even relevant, the Ninth Circuit in Felton v. Unisource Corp., 940 F.2d 503, 511-12 (9th Cir. 1991), did not hold that a one-year statute of limitations would "interfere with the policy that underlies ERISA," as Petitioners contend. Rather, in adopting the two-year statute of limitations applicable to wrongful discharge

claims under Arizona law, the Felton court merely noted in dictum that this conclusion was supported by its own earlier decision involving a different ERISA claim, in which it said that importing too short a period of limitations under state law would "interfere with the strong federal policy that underlies ERISA." Id. at 513, citing Hawaii Carpenters Trust Funds v. Waiola Carpenter Shop, Inc., 823 F.2d 289, 298 (9th Cir. 1987).[13] Felton was therefore entirely consistent with the Ninth Circuit's later decisions in Hinton v. Pacific Enterprises, 5 F.3d 391, 394 (9th Cir. 1993), cert. den. 511 U.S. 1083 (1994) and Burrey, supra, both of which held that the limitations period for § 510 actions in California is the one-year statute of limitations contained in C.C.P. § 340(3) for tortious wrongful discharge claims. Finally, to the extent that Petitioners contend otherwise, this presents only an intra-circuit conflict which has now been effectively resolved by Burrey, and is an insufficient ground for review.

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[13]Felton also expressly rejected the argument that Arizona's statute of limitations for actions based on violations of statutes should apply to ERISA § 510 claims. The court reasoned that to find that a § 510 claim is most analogous to a statutory claim, merely because ERISA is a statute, reflects "circular reasoning." Ibid., 940 F.2d at 512. The Barton court later agreed, reasoning that the cause of action for wrongful termination in violation of public policy is itself a "common law, judicially recognized cause of action, not a liability created by statute." Ibid., 43 Cal.App.4th at 1209, n.6. For this reason, Section 338(a) was therefore clearly not the appropriate limitations period to apply to Petitioners' § 510 claim.

III.

CERTIORARI IS COMPLETELY INAPPROPRIATE TO REVIEW WHETHER RESPONDENTS WAIVED THEIR STATUTE OF LIMITATIONS DEFENSE OR WHETHER THE LIMITATIONS PERIOD WAS TOLLED

Lastly, Petitioners contend that Respondents waived their statute of limitations defense by failing to raise it in their initial Rule 12(b)(6) motion filed in 1993. They also contend that the appropriate limitations period was somehow "equitably tolled" due to their ignorance of the limitations period prior to 1996. Both of these contentions are patently without merit and far too specific to the procedural circumstances of this case to warrant Supreme Court review. Because the statute of limitations defense here was raised in the answer and asserted in a motion to dismiss before trial, this case is easily distinguishable from the cases cited by Petitioners. See, e.g., Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 398, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982) (ninety-day limitation period for filing EEOC charge under Title VII held not jurisdictional and waived when not asserted until after settlement); Zenith Radio Corp. v. Hazeltine Research, 401 U.S. 321, 332-3, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971) (failure to raise defense until after trial); Van Sant v. American Express Co., 169 F.2d 355, 372 (1948) (failure to raise a statute of limitations defense at first trial before remand).

It is in fact well settled that a party may raise a defense of failure to state a claim upon which relief can be

granted in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits. Fed. Rule of Civ. Proc. 12(h)(2). As the district court itself noted in a related action between the Santa Fe Respondents and Petitioners' labor unions, a defendant preserves an affirmative defense if it includes it in its answer to the plaintiffs' pleading. Wholesale & Retail Distribution Teamsters v. Santa Fe Terminal Services, 826 F.Supp. 326, 330 (C.D. Cal. 1993). Indeed, a defendant may even raise an affirmative defense for the first time on summary judgment, absent prejudice to the plaintiff. See Rivera v. Anaya, 726 F.2d 564, 566 (9th Cir. 1984); Healy Tibbitts Construction Co. v. Insurance Company of North America, 679 F.2d 803, 804 (9th Cir. 1982).

Although the statute of limitations defense to the § 510 claim was not among the grounds that Respondents initially raised in their motion to dismiss filed in 1993, it was expressly included in the affirmative defenses pleaded in their Answers to the Second Amended Complaint filed in 1998. The defense was also specifically asserted on two occasions prior to that time in separate motions to dismiss plaintiffs' pleading following the remand of this action to the district court in 1997, and was raised again on summary judgment. Respondents therefore clearly did not waive this defense under established law, and the appellate court properly rejected this argument. (See Appendix I, p. 6a).

Nor could Respondents' failure to raise the statue of limitations defense in 1992, or Petitioners' claimed ignorance of the limitations period, have operated as any kind of "equitable tolling." (See Petition, p. 27). Where a state limitations period is applied to an action arising under a federal statute, the state's tolling provisions should be given

effect unless they conflict with the federal statute's goal. Hardin v. Straub, 490 U.S. 536, 538-44, 109 S.Ct. 1998, 104 L.Ed.2d 582 (1989). As the Ninth Circuit noted, in California the application of equitable tolling principles requires some wrongdoing on the part of the defendant. (App. I, 8a). None was present here.

Moreover, under California law, equitable tolling does not excuse a plaintiff who is merely ignorant of the applicable limitations period, as opposed to the facts underlying the claim. Gutierrez v. Mofid, 39 Cal.3d 892, 898-99 (1985). It is awareness of facts, not of their legal significance, which starts the running of the statute of limitations. Jolly v. Eli Lilly & Co., 44 Cal.3d 1103, 1109-10 (1988). Hence, Petitioners' claim that they were unaware of the limitations period applicable to § 510 actions is plainly insufficient to warrant an extended filing period. In any event, this question of the application of state law on equitable tolling to the specific facts and procedural circumstances of this case does not warrant Supreme Court review.

CONCLUSION

For all of the foregoing reasons, the petition must be denied in all respects.

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Respectfully submitted,

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